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THE UNITED STATES ROBERT SEAVER, CLERK

OCTOBER TERM, 1970

James E. MacDonald, Jr., 1692

Petitioner

v

The Shawnee Country Club, Inc., et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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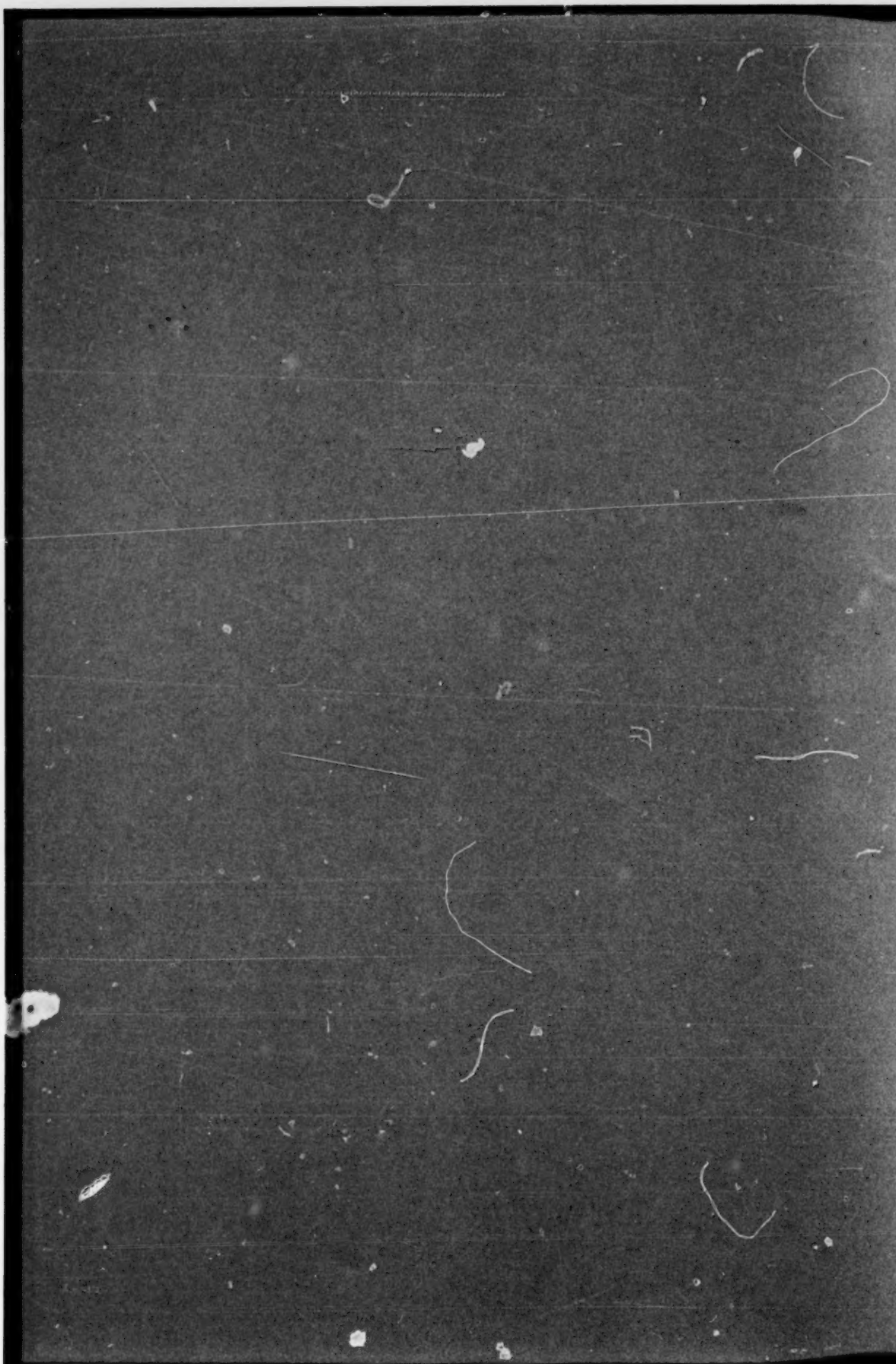

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SUPREME COURT OF THE UNITED STATES

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-v-

The Shawnee Country Club, Inc., et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on February 16, 1971.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Ohio, Western Division was not reported. It is appended hereto as Appendix C, infra. The opinion of the United States Court of Appeals for the Sixth Circuit has not yet been reported but presumably will be published. The opinion is appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 16, 1971. The jursidiction of the Supreme Court of the United States is invoked under 28 US Code § 1254(1) and 42 US Code § 1984.

JURISDICTIONAL GROUNDS

On February 16, 1971, the Court of Appeals for the Sixth Circuit affirmed the District Court for the Northern District of Ohio, Western Division at Toledo, which had dismissed the complaint because it did not state a claim upon which relief could be granted. In summary, the reasons stated in the opinion of the Court of Appeals were that the appellant was without standing; that action by a private club was involved; that the civil rights precedents applicable to Blacks do not apply to Jews and are otherwise distinguishable; and that Macdonald's expulsion from the club had not deprived him of a right or interest under color of state law or by reason of state action.

The appellant submits that important questions of federal law have not been, but should be, settled by this Court, centering around this dispute:

> Does a member of an Ohio country club corporation have a Federally protected right not to be expelled as reprisal for advocating the admission of Jews to membership, by Trustees acting under color of the Ohio Non-Profit Corporation Act, (a) operating a large liquor bar in the liquor monopoly State of Ohio, (b) operating a place of public accomodation comprehended within the definitions set out in the Civil Rights laws, (c) receiving tax preferences from both Federal and state law, and (d) depriving Macdonald of a membership having substantial cost and property value?

STATUTES INVOLVED

There are no precise Ohio statutes which specifically authorized the Board of Trustees to expel Macdonald because he wanted to admit Jews. The Ohio Non-Profit Corporation Act, Ohio Revised Code Chapter 1702, is the general source of the authority exercised by the Trustees.

Under Ohio Revised Code § 1702.30, all the power of a non-profit corporation is exercised by the Board of Trustees:

> § 1702.30 Authority of trustees; bylaws. Except where the law, the articles, or the regulations require that action be otherwise authorized or taken, all of the authority of a corporation shall be exercised by its trustees. For their own government the trustees may adopt bylaws not inconsistent with the articles or the regulations.

In expelling Macdonald from the club, the Trustees acted under color of this statute, and under the color of Ohio custom and usage.

QUESTIONS PRESENTED FOR REVIEW

1- Can a member of an Ohio incorporated country club be expelled from membership by the Trustees because he dared to speak against, and to advocate change of, a long-standing club policy of exclusion of Jews from admission to membership of a large country club?

2- Does a non-Jewish member of an incorporated country club have the Federally protected legal freedom, as a civil right, without abridgement by expulsion from membership, to ask the Trustees to admit qualified Jews to membership?

3- Is unlawful state action present when the trustees of an Ohio country club corporation, exercising power under the color of Ohio statutes, expel a member because of his espousal of a change in club policy which had excluded Jews from membership, when the trustees also operate a large restaurant, bar, and other facilities serving alcoholic beverages by-the-drink to thousands of member and non-member customers each year, in the liquor monopoly state of Ohio, in a bar operated without a license but with the knowledge and sufferance of Ohio liquor law authorities? What of the added facts that the Ohio Director of Liquor Control has refused to enforce the Ohio liquor laws against this country club corporation even after having been challenged to do so by a mandamus action in the Supreme Court of Ohio; and by his expulsion under color of Ohio law, the trustees forfeited, without recompense, the member's $650 admission investment and his

ten year active membership in a corporation with property values of $2,000,000 owned by fewer than 500 members?

4- Is there Federal jurisdiction under the Federal civil rights laws to protect a member from expulsion by the Board of Trustees of an Ohio country club corporation, in reprisal for his urging an end to an anti-Jewish exclusionary policy, where the corporation operates a restaurant, sports arena, golf course and other places of public exhibition and entertainment, and receives goods, services and customers in large volume from sources outside the State of Ohio?

5- Where the country club corporation is exempt from Federal income tax, and from Ohio franchise taxes, do the actions of the Board of Trustees under color of the Non-Profit Corporation Act violate the rights of a non-Jewish member where he is expelled for daring to speak out in favor of a change in a long-standing club policy excluding Jews from club membership?

6- Does a non-Jewish active member of an Ohio non-profit country club corporation have standing in a Federal Court to protest expulsion by the Trustees, where he has invested $650 as the price of admission to membership, and has paid regular monthly dues for ten years thereafter, and where his expulsion, because he dared to urge the end of a long-standing exclusionary policy directed against Jews, was taken by Trustees of

the corporation under color of authority granted by the Non-Profit Corporation Act of Ohio?

7- Do the civil rights of various groups of persons differ, depending upon whether they are classified and differentiated by race or by religion? Do Fourteenth Amendment civil rights granted to Blacks, recognized by the Supreme Court, comparably protect Jews? And whites? Does it make a difference when a white advocates a change in the club policy as applied to the admission of Jews as compared to a change which would apply to Blacks? Or is the member's right the same, whether he speaks to and advocates policies as to Blacks, or as to whites, or as to Indians, or as to Orientals, or as to Jews?

STATEMENT OF THE CASE

Petitioner James E. Macdonald was expelled from The Shawnee Country Club Inc., an Ohio membership corporation, on January 4, 1965, for advocating change of the club's exclusionary policy which denied membership to Jews. He wrote a letter to the Board of Trustees, asking for a change. In response, they notified him that he had been expelled from membership. From that time forward, all rights and privileges of membership were denied to him and to his family. Macdonald paid $650 for his membership, had paid monthly dues for 10 years, and was in good standing in all other respects.

The country club had 425 members. It caters to fifty thousand people every year, a significant proportion of whom are not club members. It operates a restaurant, a golf course, tennis courts, a big parking lot. It uses water furnished by the City of Lima. It operates a profitable bar in a dry township in a liquor monopoly state, without a license, all by sufferance of the Department of Liquor Control of the State of Ohio. The trustees derive their authority from a corporate charter granted by the State of Ohio. The corporation pays no Ohio corporate franchise fee. And it has long claimed to be exempt from Federal income tax.

The petitioner commenced suit in the United States District Court at Toledo asking for declaratory judgment, an injunction, reinstatement to membership in the club, money damages and attorneys fees. The complaint was based on the civil rights statutes, 42 US Code § 1981, § 1982, § 1983, § 1985, § 1986, § 1988, and the Civil Rights Act of 1964, 42 US Code § 2000a-1 et seq., and upon the First, Fifth and Fourteenth Amendments. Federal jurisdiction was predicated upon 28 U.S. Code § 1331, § 1343, § 2201 and upon 18 U.S. Code § 241. The District Court dismissed the complaint.

The Court of Appeals dismissed the appeal because it concluded that there was no cause of action stated. The gist of the opinion appears in this extract:

> For the reasons that the appellant is without standing, that the club of which he was formerly a member is a private club or association, and that the appellant has been deprived of no right or interest under color of state law or by reason of state action, we concur in the finding and holding of the District Judge in dismissing the complaint for failure to state a claim upon which relief may be granted.

REASONS FOR GRANTING THE WRIT

1-2-The decision of the Court of Appeals has invoked the common notion that a private club - whatever that is - can do pretty much what it wants to do:

> "For the reasons....that the club of which he was formerly a member is a private club or association ....",
>
> the expulsion was permissible.

This principle, unbridled, would grant license to the Board of Trustees of a private country club of 425 members, invoking an Ohio charter, to oust any member who dared publicly to advocate any policy which offended the attitudes of a majority of the Trustees. Neither the Mayor of the City of Lima, nor the Sheriff of Allen County, nor the Governor of the State of Ohio, nor the Common Pleas Judge could do this. They are forbidden by the Fourteenth Amendment from taking any action which infringes Macdonald's right to talk about a change of club policy. The Secretary of State could not issue a charter which permits the corporation to do an unconstitutional act. Yet in contrast, a majority of the Board of Trustees (the vote was divided, we shall show) exercised more unbridled power than the Mayor, the Police, the Governor, the Judge, the Secretary of State, would dare to claim.

Now that a majority of the Trustees have muzzled Macdonald by expulsion, they can effectively coerce the rest of the club membership - who might even be a dissenting majority - by threatening to use the same unbridled power to expel.

3- While the Trustees of the country club are exercising their official authority by ousting Macdonald from a $650 membership under a corporate charter obtained from the State of Ohio, they continue to run the business of the club. They pay no Federal income tax. They pay no franchise fees for the corporate privileges because they are excused from doing so by the Ohio corporation franchise tax laws. All the while they exploit a profitable hiatus in the Ohio liquor monopoly laws* by operating a profitable bar in an otherwise dry township.

This case is the logical counterpart to the Moose Lodge cases now pending, Moose Lodge No. 107 v Irvis et al., October Term, 1970, number 1202.

*Macdonald tried to get the Ohio courts to direct the Liquor Director to end clubs virtual extra-legal exemption from the Ohio liquor control laws. The Supreme Court turned him down because, as a private citizen, it ruled he had no standing to sue. State of Ohio ex rel. Macdonald v Cook, Director of Liquor Control, 15 Ohio St. 2d 85(1968).

All the while the trustees exercise these corporate privileges, they violate Macdonald's civil rights, granted by Federal law, and granted by the Ohio Constitution, and in turn protected by Federal law. They deny his constitutional right to speak freely to advocate changes of policy. No public officer could legally forbid Macdonald's right to speak. Above the law, the trustees put all these Ohio corporate privileges to daily use, meanwhile denying to Jews, because of their religion, the hope to join the club, and then punishing Macdonald because he dared to question why.

4- The trustees of the Shawnee Country Club are exercising all the corporate powers granted by the State of Ohio. Its trustees invoke state authority, operate a sizeable state liquor bar, do an interstate business plainly comprehended with the factual tests and definitions in the Civil Rights Acts, and operate as exempt from taxes, Federal or state. Yet they claim to be private, authorized to make their own rules, and invoke the authority to oust a member who suggested the need for a review of Jewish exclusion policies.

The big golf club, sports arena, restaurant and places of public exhibition are the very places at which the Civil Rights Acts were aimed, and as defined, were determined by statute to be public. The Civil Rights Laws protect the rights of strangers coming from interstate commerce, and should also protect the interests of members of a membership corporation. They also grant a Federal right to the protection of Ohio civil rights granted by

the laws of the state of Ohio.

5- Not only is The Shawnee Country Club operating a large business, but it is getting both Federal and Ohio tax advantages. This factor alone brings into operation the Civil Rights Acts, and the decisions of the courts which deny private club status to those who receive tax benefits. Besides that, Federal statutes forbid others from withholding civil rights privileges, and forbid coercion in exercise of privileges granted by the Ohio Constitution and by Federal law.

6- Furthermore, the Court of Appeals held that Macdonald had no standing to sue, now that he has been expelled by the trustees, to question the propriety of his own expulsion from membership.

> "For the reason that the appellant is without standing ...,"

the Court of Appeals explicitly said that Macdonald cannot challenge his own expulsion!

Who better has standing to question Macdonald's expulsion? Whose money was forfeited? More importantly, who can try to get a change of policy -- from the inside -- other than an insider? And can the official majority of trustees coerce silent conformity to their policies so that, when they oust the gutsy gadfly, he will have no standing to sue?

-- WHO BETTER? --

Somebody on the inside needs to have access, to speak to the membership, to persuade club trustees to follow reasonable policies. If the vote and influence of members can get the ear of the power people, change will come spontaneously. But when the inside gang run the whole show, and reject change, and they muzzle and expel advocates of change, individual members are at the mercy of trustees who choose to throw them out. And what kind of questions and discussions are verboten on pain of expulsion?

7- The Court of Appeals said, in its opinion, that the rules forbidding religious discrimination are different from those which affect racial minorities. Macdonald asked for a change in the club's anti-Jewish policy. In brief to the Sixth Circuit, we cited cases which, we thought, plainly protected his right to advocate change. Not so, said the Court of Appeals, these precedents are for Blacks, not for Jews:

> "Appellant's reliance upon such cases as Jones v. Mayer Company, 392 U.S. 409(1968); Flast v. Cohen, 392 U.S. 83(1967); Shelley v. Kraemer, 334 U.S. p. 1(1948); Bell v. Kenwood Golf & Country Club, Inc., 312 F. Supp. 753 (D. Md. 1970); and House v. City of Grenada, 262 F. Supp. 19 (N.D. Miss. 1966), is in our opinion misplaced, as these authorities deal

with various aspects of racial discrimination and are otherwise factually distinguishable ...." (emphasis supplied)

It is true, of course, that the cases cited in the quoted portion of the opinion protect the rights of Blacks. We urge that this Court will not permit the power people of the membership club to utilize their office as trustees to manipulate the corporate machinery - granted to them by the State of Ohio - to expel Macdonald as punishment for daring to urge the need for change, any change.

Racial discrimination laws may be distinguished from those which treat with religious discrimination, but the distinction is mostly historical. By now, this Court has obliterated most of the differences based upon this historical background. The Fourteenth Amendment protects "persons", even fictional persons such as corporations. Of course, measured in the narrow terms of their religious views, Jews are distinguishable from Christians, Moslems and atheists. It is easy to describe the differing physical qualities of most Blacks, most Orientals, most Indians, most whites. But from the judicial evolution of the last century, it is now plain to see that these narrow factual distinctions seldom support legally different consequences. It is hard to image a situation where differences in race, creed, and color can produce different legal results.

History has been rolled back. By now, we are all men, all equal before the law. American law is not only color blind, but it cannot constitutionally make a choice between differing views of things supernal. And some men cannot use powers granted by the state to punish others because they choose to be different.

CONCLUSION

The Court of Appeals has erroneously decided important questions of Federal law which should be settled by the Supreme Court. It has decided Federal questions so as to conflict with the unbroken line of the decisions of this Court.

For these reasons, we urge that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert W. Lett

Richard Theodore Boehm

Columbus, Ohio

May 10, 1971

APPENDIX A

EXTRACTS FROM THE OHIO NON-PROFIT CORPORATION ACT OHIO REVISED CODE CHAPTER 1702

Ohio Revised Code § 1702.11:
Contents of regulations. The "regulations ... may include provisions with respect to:

* * *

(2) The ... censure and suspension of members, and the termination of membership ...."

Ohio Revised Code § 1702.13:
Membership.

* * *

(C) Membership in a corporation may be terminated in the manner provided by law, the articles, or the regulations, and upon the termination of membership for any cause, such fact and the date of termination shall be recorded in the membership book.

(D) Unless the articles or the regulations otherwise provide, all the rights and privileges of a member in the corporation and its property shall cease on termination of his membership.

Ohio Revised Code § 1702.30:
Authority of trustees; bylaws. Except where the law, the articles, or the regulations require that action be otherwise authorized or taken, all of the authority of a corporation shall be exercised by its trustees. For their own government the trustees may adopt bylaws not inconsistent with the articles or the regulations.

APPENDIX B

OPINION OF THE UNITED STATES
COURT OF APPEALS
No. 20341

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES E. MACDONALD, JR., for himself, and for all others similarly situated,
Plaintiff-Appellant,
v.
THE SHAWNEE COUNTRY CLUB, INC., et al.,
Defendants-Appellees.

APPEAL from the United States District Court for the Northern District of Ohio, Western Division.

Decided and Filed February 16, 1971.

Before: PHILLIPS, Chief Judge, MILLER, Circuit Judge, and O'SULLIVAN, Senior Circuit Judge.

PER CURIAM. Appellant James E. Macdonald was allegedly expelled from membership in the appellee county club for advocating the suspension of the club's exclusionary policy which denied membership to Jews.[1] Appellant brought action in federal district court for equitable relief and damages. The gist of his complaint is that after he addressed a letter to the President of the Shawnee Country Club indicating his intention to advocate the dropping of the religious bar at a future meeting, he was notified that he had been expelled from membership and that all rights and privileges of membership were denied to him and his family. Appellant asserted that such action by the club is violative of rights secured by the

[1] We construe the complaint as one complaining only of the club's alleged exclusionary policy with respect to religion, although brief references are made in the complaint to the exclusion of Negroes.

First, Fifth, and Fourteenth Amendments to the Constitution of the United States. The complaint further alleged that appellant was entitled to relief under the Civil Rights Statutes, 42 U.S.C. §§ 1981-83, 1985-86, 1988, and under the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq. Federal jurisdiction was predicated upon 28 U.S.C. §§ 1331, 1341, 1343, 2201, and upon an implied right of action arising under 18 U.S.C. § 241. In addition, appellant sought to invoke the jurisdiction of a three-judge court under 28 U.S.C. § 2281 and to have his claim treated as a class action. The relief sought included a declaratory judgment, an injunction, and reinstatement of appellant to his membership, as well as money damages and attorneys' fees.

This case is the third such complaint filed by appellant upon substantially the same allegations of fact. The first action, filed in 1967, was dismissed upon motion of the defendants under Rules 12(b) (1) & (6), Fed. R. Civ. P. ". . . without prejudice to any further rights plaintiff may have under the law." Civ. Action No. C 67-90 (N D. Ohio June 8, 1967). In 1968 the second action was similarly dismissed under Rule 12(b) (1) & (6) and also in accordance with a local rule of the District Court for failure to respond to defendant's motion. Civ. Action No. C 68-52.

In the present case appellees moved again in the District Court to dismiss for lack of jurisdiction under Rule 12(b) (1) and failure to state a claim for which relief could be granted under Rule 12(b)(6). On January 23, 1970 the District Court dismissed the instant action in an opinion which found that the dismissal of the 1968 action was res judicata and further that the complaint failed to state a claim upon which relief could be granted. We affirm the judgment of the District Court on the ground that the complaint fails to state a claim upon which relief can be granted.[2]

[2] While the District Court found that the dismissal of the 1968 action would apply as res judicata of the instant action, he also considered and disposed of the complaint on the merits. Since

Initially we affirm the holding of the District Court that appellant is not entitled to maintain the action as a class action pursuant to Rule 22, Fed. R. Civ. P. The complaint does not allege facts showing or identifying a class having common characteristics with appellant or a class having members who are similarly situated. As found by the court below the appellant is a white protestant. We also agree that the complaint sets forth no basis for a three-judge court.

For the reasons that the appellant is without standing, that the club of which he was formerly a member is a private club or association, and that the appellant has been deprived of no right or interest under color of state law or by reason of state action, we concur in the finding and holding of the District Judge in dismissing the complaint for failure to state a claim upon which relief may be granted.

Appellant's reliance upon such cases as *Jones* v. *Mayer Company*, 392 U.S. 409 (1968); *Flast* v. *Cohen*, 392 U.S. 83 (1967); *Shelley* v. *Kraemer*, 334 U.S. p. 1 (1948); *Bell* v. *Kenwood Golf & Country Club, Inc.*, 312 F.Supp. 753 (D. Md. 1970); and *House* v. *City of Grenada*, 262 F.Supp. 19 (N.D. Miss. 1966), is in our opinion misplaced, as these authorities deal with various aspects of racial discrimination and are otherwise factually distinguishable.

Affirmed.

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we agree with his dismissal of the complaint for failure to state a valid claim for relief, we find it unnecessary to determine the res judicata issue.

APPENDIX C

OPINION OF THE UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

James E. Macdonald, Jr., etc.,

Plaintiffs,

vs. No. C 69-135

The Shawnee Country Club, Inc., et al.,

Defendants.

O P I N I O N

- - -

YOUNG, J: Filed January 23, 1970

Plaintiff seeks to bring this action as a class action for himself and all others similarly situated to enjoin the defendant club from pursuing its present policy of excluding from membership negroes and jews and to require defendant club to restore plaintiff to membership in said club with all the rights and privileges appurtinent thereto. The jurisdiction of this Court to hear the questions is predicated upon 18 U.S.C. §§ 241-42; 28 U.S.C. §§ 1331, 1343, 2201 and 2281; 42 U.S.C. 2000a-6. Plaintiff alleges that his causes of action arise under Article I § 10 and Article IV §§ 2 and 4 of the Constitution of the United States and the First, Fifth

and Fourteenth Amendments thereto and 42 U.S.C. §§ 1981-83, 1985-86, 1988 and 2000.

This is the third time that plaintiff has come into this Court seeking this relief. In prior cases, C 67-90 and C 68-52, plaintiff predicated jurisdiction and his causes of action on substantially the same bases, C 67-90 omitting 42 U.S.C. §§ 1982, 1986, 2000 and 2000a-6; C 68-52 omitting 42 U.S.C. §§ 1982 and 1986.

In both of the former cases as well as this case plaintiff has alleged that the defendant country club discriminated against the admission of negroes and jews and that the plaintiff was expelled from the club for advocating a change in this policy. In all of these cases plaintiff has sought to have the exclusionary policies of the defendant club enjoined and to have his expulsion set aside as being a taking of property without due process of law and as being an infringement of plaintiff's First Amendment right of free speech.

In each case the plaintiff has added additional individual defendants. These individuals are the trustees of the defendant club and have been added because of their status as such.

The relief that plaintiff has sought has varied slightly from case to case but the basic relief in each case for an injunction against the defendant club's exclusionary policy and reinstatement have always been present. In each case plaintiff has requested that

the case be heard by a three judge court. The two prior cases were dismissed for failure of plaintiff to state a claim upon which relief can be granted.

The defendants have moved to have this case dismissed on the ground that the present case fails to state a claim upon which relief can be granted. The defendant also moves to dismiss the complaint on the ground that the previous cases are res judicata to the issues in this case. The dismissal in C 67-90 was limited to the particular complaint. In C 68-52 the plaintiff did not oppose the motion to dismiss and the complaint was dismissed on an order. While the issue has been raised, counsel has not briefed the peculiar problems inherent in determining whether the doctrine of res judicata should be applied in this case.

> Where a valid and final personal judgment is rendered on the merits in favor of the defendant, the plaintiff cannot maintain an action on the original cause of action. RESTATEMENT, JUDGMENTS § 48 (1942).
>
> Where a valid and final personal judgment in favor of the defendant is rendered on the ground that the complaint is insufficient in law, the judgment is conclusive as the matters determined, and if the judgment is on the merits the plaintiff cannot thereafter

maintain an action on the original cause of action. RESTATEMENT, JUDGMENTS § 50 (1942).

These rules speak in terms of cause of action -- not relief or statutory basis for an action. "A cause of action consists of those facts as to two or more persons entitling at least some one of them to a judicial remedy of some sort against the other, or others, for the redress or prevention of a wrong." 1 BOUVIER, DICTIONARY 436 (1914). In federal court the theory is that one no longer pleads in terms of causes of action but sets forth a short plain statement of facts upon which the plaintiff claims entitlement to relief. Rule 8(a) Fed. R. Civ. Pro. Since the basic facts upon which plaintiff claims entitlement to relief were identical in C 68-52 with the present case, the doctrine of res judicata may be applicable.

Before the doctrine of res judicata can be applied to a particular cause of action the parties in the previous suit must be identical with the parties in the present action. Where the parties are sued in their representative capacities, such as public officials or corporate directors, the fact that the named parties may differ does not destroy the identity of parties with those in a prior suit against individuals holding the same representative position. IB C. MOORE, FEDERAL PRACTICE §.411/3/ (1965). Plaintiff has stated no facts particularly involving those individuals added to the board of trustees subsequent to his last suit. As such the Court can only conclude that these individuals

are sued only in their representative capacities. Therefore the Courtwill rule that the dismissal of C 68-52 precludes the plaintiff's bringing of this suit.

In each of these cases the plaintiff has sought to have the cause heard by a three judge court. This Court specifically ruled in C 67-90 that plaintiff was not entitled to such a court. 28 U.S.C. § 2281 only applies to suits requesting an injunction to restrain the enforcement of a state statute or the act or acts of a state official or agency. 42 U.S.C. § 20002-5(b) applies only to civil rights actions in which the Attorney General has intervened and has requested a three judge court. Neither of these provisions are applicable to the present case. There being no colorable claim which would require a three judge court, none will be impaneled.

Plaintiff seeks to bring this suit for himself and all others similarly situated. Plaintiff is a white protestant who was expelled from the defendant club for advocating change. Plaintiff does not allege that there are any other individuals who have these same characteristics. Therefore, there is no class within the meaning of Rule 23 of the Federal Rules of Civil Procedure on whose behalf the suit could be prosecuted, and plaintiff is not entitled to prosecute the suit as a class action.

While plaintiff's objectives in seeking to terminate defendant club's exclusionary policy may be laudable, this Court does not determine cases

solely upon the nobleness of the objectives sought to be enforced therein. Article III of the Constitution requires that this Court hear only cases or controversies. To implement this, the federal courts have developed rules of standing to determine whether an individual has a sufficient interest in a particular suit to maintain it in the federal courts. These are called rules of standing. An individual must have a substantial interest which is affected by the rule which he seeks to attack and must not be seeking "to employ a federal court as a forum in which to air his generalized grievances. . ." Flast v. Cohen, 392 U.S. 83, 106 (1968); see, Baker v. Carr, 369 U.S. 186 (1962). The rules of standing as laid down in Massachusetts v. Mellon, 262 U.S. 447 (1923) were not abrogated by the decision in Flast in so far as the requirement is concerned that the plaintiff have a sufficient interest in the issues which he places before the court for decision.

Certainly, were the plaintiff a member of the club he would have an interest in having jews and negroes as members of the club. Undoubtedly it would be his opinion that his membership would be made less meaningful and valuable because of a rule prohibiting their membership. But the Court believes this right to be too insubstantial to permit the courts to entertain litigation concerning it. See, Tileston v. Ullman, 318 U.S. 44 (1943). It is much the same as if a Catholic were sued to set aside the policy of the church excluding protestants from membership. While one member might be of the opinion that his

membership rights would be enhancedby the elimination of this rule, another might feel that the rule itself makes membership meaningful. This certainly does not present either with a sufficient interest to support a suit or an issue which is truly capable of solution by a court of law.

The proper person to challenge this exclusionary policy would be a negro or jew who has applied for membership and been excluded on the basis of his race. When such a person applies for membership and is denied, the question of the application of 42 U.S.C. §§ 2000a-1 et seq.to the defendant club will be squarely placed before the court rather than such an internal disagreement over the policy as the present and prior complaints of the plaintiff present.

Plaintiff is not presently a member of the defendant club. As such he has no membership interest in the club whatsoever. His only interest is that of someone outside the club who is not excluded by the exclusionary policy of the club, but who believes that such policy is improper. Therefore plaintiff simply has no interest which is affected by the exclusionary policy of the defendant club unless he is able to prevail on his suit for reinstatement in the club.

The law governing the internal operations of societies is state law created rather than federal law. A member of a private association acquires at best only a quasi-interest in the property of the association. This right is terminated upon the member's death,

resignation or expulsion from the society. Gasely v. Separatists' Society, 13 Ohio St. 144 (1862). Thus the question of whether the plaintiff has been deprived of his property without due process of law or discriminated against in the possession of property in violation of 42 U.S.C. § 1982 turns solely upon the question of whether plaintiff has properly been expelled from the defendant club.

Expulsion from private societies is a matter governed primarily by state law. Ohio imposes upon a private association a quantum of due process which has to be complied with before the expulsion is valid. Blumenthal v. Chamber of Commerce, 8 Ohio Dec. Reprint 410 (1882), aff'd 8 Ohio Dec. Reprint 622 (undated). See, Koblitz v. Western Reserve University, 11 Ohio Cir. Dec. 515 (1901); Dawkins v. Antrobus, 17 Ch. D. 615 (1881); See generally, Chaffee, Internal Affairs of Corporations Not for Profit, 43 Harv. L. Rev. 993 (1930); 1 T. EMERSON, D. HABER, N. DORSON, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1203 (3rd Ed. 1967).

It does not appear that the state courts have had the opportunity to pass on the question of whether a private association can expel a member for advocating a change in the rules of that association or whether the procedure for expulsion employed in this case comports with the procedure required by the law of Ohio. In order to avoid any possible interference with the development of the state law regarding private associations, this Court will refrain from considering these two issues until the state courts

have had an opportunity to pass upon them in a proper suit. Burford v. Sun Oil Co., 319 U.S. 315 (1943).

The civil rights statutes, 42 U.S.C. §§ 1981 et seq. have been invoked in aid of plaintiff's suit for reinstatement in defendant club. In addition the plaintiff has attempted to invoke an implied right of action under 18 U.S.C. §§ 241-42. Such implied rights of action are not unknown in the law. Allen v. State Board of Elections, 393 U.S. 544 (1969); Borak v. J. I. Case, 377 U.S. 426 (1964); Bell v. Hood, 327 U.S. 678 (1946); Kardon v. National Gypsum Co., 69 F.Supp. 512 (1946); cf. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). Assuming that such a right exists, such a right would cover the same ground that is already covered by 42 U.S.C. §§ 1981, 1983, 1985-86.

To maintain a suit under 42 U.S.C. § 1983 the plaintiff must not only show that he has been deprived of his civil rights but that he has been so deprived under color of state law. The greater part of the briefs of both parties have been devoted to the question of whether the actions of the defendant club and its officers can be considered to be under color of state law. After due consideration the Court has come to the conclusion that such is not the case.

The recognition that the defendant club exists and the regulation of such through the corporation not for profit and other licensing statutes is simply recognition and regulation and does not cloth the defendant club's actions with

the color of state law. The Court is not unaware that state enforcement of private discriminatory clauses in the area of property ownership or political rights cannot be sustained. Shelly v. Kraemer, 334 U.S. 1 (1947); Terry v. Adams, 345 U.S. 461 (1953). The licensing and regulation of the defendant club does not change its character. Were the plaintiff's arguments to be accepted, there would be no such thing as a private club.

Since plaintiff has not established a property right in the defendant club he cannot maintain the suit under 42 U.S.C. § 1982.

To maintain a suit under the remainder of the civil rights statutes and under the general provisions of the Constitution with the exception of the Fourteenth Amendment, plaintiff need only show that his civil rights have been infringed by his expulsion from defendant club. Plaintiff has alleged that he has been deprived of a general group of First Amendment rights by the defendant's actions; freedom of speech, freedom of the press, freedom of association, freedom of assembly. The Court is unable to find that any of plaintiff's civil rights have been infringed.

Plaintiff may have an absolute right to speak out against the exclusionary policy of the defendant club, but he does not have an absolute right so to speak anywhere. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Schenck v. United States, 249 U.S. 47, 52 (1919). Certainly plaintiff would not urge that an

individual in his private home could be forced to hear opinions that he does not desire to hear. The members of a private organization can unquestionably limit the scope of statements which can be made within the confines of that club. To hold otherwise would mean that the Knights of Columbus could not expel a member for advocating the doctrines espoused by Martin Luther and John Calvin. This is amply demonstrated by the opinion in Gannon v. Action, 303 F. Supp. 1240 (E.D. Mo. 1969).

While plaintiff has raised freedom of the press, the Court is unable to see wherein plaintiff's actions have involved this freedom. The writing of a letter is as much freedom of speech as freedom of the press and the latter is usually considered mass presentation of ideas and opinions to the general public in writing, which simply has not occurred here.

Plaintiff claims that his freedom of association has been infringed. What plaintiff forgets is that if he prevails, the freedom of association of some of the other members of the defendant club may be infringed. Freedom of association does not mean that the place of that association may not be limited. A private association has a perfect right to discriminate in its membership so long as the organization is truly private. "A private golf club, . . . restricted to either negro or white membership is one expression of freedom of association." Evans v. Newton, 382 U.S. 296, 299 (1966). Plaintiff has never been denied the right to freely associate with negroes and jews -- he has only

been denied the right so to associate as a member of defendant club. Membership in defendant club was not one of plaintiff's civil rights nor was it so closely associated with such rights as to be necessary to make defendant's civil rights meaningful. Cf. Sullivan v. Little Hunting Park, Inc., 38 L.W. 4059 (Dec. 15, 1969). Thus plaintiff was not deprived of any of his freedom of association by the defendant club's exclusionary policy or his expulsion from the defendant club for advocating the termination of such policy.

Finally plaintiff has alleged that his freedom of assembly has been infringed by this action. It appears that plaintiff desired to have an open meeting called to consider the termination of the exclusionary policy. Although no longer a member of the club, plaintiff still has the right to call a meeting of the members on his own. As far as calling an official meeting of the members he has always been limited to the provisions of the constitution and by-laws of the defendant club. If under those he could call such a meeting, and was expelled from the club for exercising his rights thereunder, this is a question of the state law, and the Court will defer the exercise of its jurisdiction to the state. Otherwise, plaintiff's freedom of assembly has in no way been infringed by the actions of the defendant club.

While the law recognizes that private individuals have a right to form private associations which discriminate in membership along the lines of race, religion and sex, it does not favor such organizations when they are unwilling to admit such discrimination. Likewise, an

organization which does discriminate along such lines is to be looked upon with suspicion when it is unwilling fully and fairly to review its discriminatory policies.

Neither does the law look with favor upon the individual who, having lost his first law suit, does not appeal but brings a second suit over the same matter. Such harassing tactics infringe upon the civil rights of the other parties and can in a proper suit be the basis for damages. Regardless of the nobleness of plaintiff's motives, he must realize that his further remedy is by appeal, not by further suit in this Court.

The matters in this suit being res judicata and also not stating a claim upon which this Court in the proper exercise of its jurisdiction can grant relief, the motion of defendants to dismiss will be granted. An order will be entered accordingly.

Donald J. Young
United States District Judge

In conformity with Rule 77 (d)F.R.O.P.
please take notice that the following order
or judgment was entered in this court on
Jan 23 1970
J. A. Green, Clerk

Toledo, Ohio

APPENDIX D

UNITED STATES CONSTITUTION:

SELECTED CIVIL RIGHTS PROVISIONS

Amendment XIV, Article 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment 1:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

FEDERAL CIVIL RIGHTS STATUTES

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42 U.S. Code § 1981:

Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

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42 U.S. Code § 1982:

Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

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42 U.S. Code § 1983:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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42 U.S. Code § 1984:

Same; review of proceedings

All cases arising under the provisions of this Act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are provided by law for the review of other causes in said court.

42 U.S. Code § 1985

Conspiracy to interfere with civil rights—Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

42 U.S. Code § 1985 (Cont'd)

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S. Code § 1986

Same; action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

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42 U.S. Code § 1988

Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

APPENDIX F

CIVIL RIGHTS GRANTED BY THE OHIO CONSTITUTION

Article I, Section 1:

Right to freedom and protection of property.

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

Article I, Section 7:

[Rights of conscience; education; necessity of religion and knowledge.]

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

Article I, Section 11:

[Freedom of speech and of the press; libel.]

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

APPENDIX G

CIVIL RIGHTS GRANTED BY FEDERAL STATUTES

Title 18, U.S. Code § 241

Conspiracy against rights of citizens

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

Title 18, U.S. Code § 242

Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

APPENDIX H

CIVIL RIGHTS CREATED BY CIVIL RIGHTS ACT OF 1964

Title 42 § 2000a-1

Prohibition against discrimination or segregation required by any law, statute, ordinance, regulation, rule or order of a State or State agency

All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Title 42 § 2000a-2

Prohibition against deprivation of, interference with, and punishment for exercising rights and privileges secured by section 2000a or 2000a—1 of this title

No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 2000a or 2000a—1 of this title, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 2000a or 2000a—1 of this title, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 2000a or 2000a—1 of this title.

Prohibition against discrimination or segregation in places of public accommodation—Equal access

(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Operations affecting commerce; criteria; "commerce" defined

(c) The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in

the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

Support by State action

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

Private establishments

(e) The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

APPENDIX J

JURISDICTION OF FEDERAL COURTS IN CIVIL RIGHTS CASES

Title 28, U.S. Code § 1331

Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

Title 28, U.S. Code § 1343

Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Title 28, U.S. Code § 2201

Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

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JUN 7 1971
E. ROBERT SEAVER, CLERK

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1970

James E. Macdonald, Jr.,

Petitioner

- v -

No. 1692

The Shawnee Country Club, Inc., et al.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

James E. Macdonald, Jr.,

Petitioner

- v -

The Shawnee Country Club, Inc., et al.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ANALYSIS OF QUESTIONS PRESENTED FOR REVIEW

The seven questions Petitioner has presented for review raise but one issue.

The Petition for Certiorari seeks a review of Petitioner's expulsion from the Respondent Country Club.

Questions 2 through 5 add certain additional matter to the request for the review of Petitioner's expulsion from Respondent Country Club.

In question 2 it is the statement that the expulsion violated Petitioner's Civil Rights.

In question 3 it is the statement that the expulsion was conducted by the officers of a corporation organized under the laws of Ohio.

In question 4 it is the statement that at the time of expulsion the Respondent Corporation operated certain facilities and purchased goods and services in the operation of those facilities.

In question 5 it is the statement that at the time of expulsion Respondent Club was exempt from Federal Income Tax and Ohio Franchise Tax.

In question 6 the Petitioner seeks review of his expulsion by asking the Court to determine his standing to maintain the suit to review his expulsion.

In question 7 the Petitioner presents a question which does not appear applicable to this action since no discrimination is alleged to Petitioner because of his race or religion.

THE ISSUE PRESENTED FOR REVIEW

The issue presented by the Petition for Certiorari is whether Petitioner's expulsion from the Respondent Club should be the subject of review for the purpose of settling important questions of Federal Law that have not been but should be settled by this Court.

STATEMENT OF CASE

The Petitioner's statement of this case omitted certain facts vital to the determination of this Petition. The Petitioner filed in the Supreme Court of the State of Ohio a quo warranto action seeking the appointment of a receiver for The Shawnee Country Club, State Ex Rel. Macdonald vs. The Shawnee Country Club, et al. 2 OS 2nd 325 207 NE2 658 (Supreme Court, Ohio, 1965).

After the filing of this action on December 14, 1964 by the Petitioner a meeting of the Board of Trustees of the Club was held on December 16, 1964 at which a motion to expel Petitioner was made for the reason that his actions had been noncompatible with the welfare, character and interest of the Club. Pursuant thereto a notice was issued to the Petitioner notifying him of a hearing which was to be held on January 4, 1965, for the purpose of permitting him to present any matters he might desire in connection with the motion which had been made to expel him. At the conclusion of the hearing on January 4, 1965, the Board of Trustees voted unanimously to expel the Petitioner from membership in Respondent Country Club.

RESPONDENT CLUB IS A PRIVATE CLUB

The Court of Appeals in its decision (set forth in Appendix B of the Petition at Page IV) found the Respondent Country Club to be a private club. The District Court, in its opinion, (set forth as Appendix C to the Petition at Page XII) found the Respondent Country Club to be a private club.

The Petition contains no allegation that the Club is in fact open to the public.

The statement of the case (Page eight of the Petition) makes reference to the Respondent Country Club catering to fifty thousand (50,000) people every year, "a significant proportion of whom are not Club members". This statement avoids alleging that the Respondent Country Club was open to the public and attempts, by insinuation, to create the impression that the Club was in fact open to the public. It should be noted that the statement at Page 8 of the Petition made in this regard is in no way inconsistent with the use of the Respondent Country Club by its own members and their guests.

The actual allegations of the Petition are that Respondent Country Club is a mem-

bership corporation (Page 8 of the Petition) and a private club (Page 10 of the Petition) having four hundred twenty-five (425) members (Page 8 of the Petition) membership in which cost the Petitioner Six Hundred Fifty Dollars ($650.00) (Page 11 of the Petition) and monthly dues (Page 6 of the Petition) and the Trustees of which exercised their authority to expel Petitioner (Pages 6 and 11 of the Petition) subsequently barring Petitioner from all rights and privileges of membership (Page 8 of the Petition).

This Court in Daniel vs. Paul, 395 US 30, 23L Ed 318, (1969), has by implication defined a private club. In that case Lake Nixon was found not to be a private club and the statement was made in the opinion at Page 301 that "It was simply a business operated for profit with none of the attributes of self government and member ownership traditionally associated with private clubs."

Respondents submit that the statements contained in the Petition show the self government and member ownership of Respondent Shawnee Country Club and support the holding of the District Court and the Court of Appeals.

PETITIONER'S RIGHT AS A MEMBER OF A PRIVATE CLUB

Petitioner is entitled to notice of and hearing on the charges brought against him in accordance with the rules of Respondent Country Club and to a proceeding in good faith in accordance with the laws of the land. State Ex Rel. Ohio High School Athletic Association et al. v. Judges of the Court of Common Pleas of Stark County, 173 OS 239, 19 002 52, 181 NE2 261, as followed Lough et al. v. Varsity Bowl, Inc. et al. 16 OS2 153, 45 002 483, 243 NE2 61. Also see Cheny v. Ketcham 50NP 139, 7-OD-183 as quoted in 20 ALR2 344, et seq., Bouldin v. Alexander (US) 15 Wall 131, 21 L ed 69; Watson v. Jones (US) 13 Wall 679, 20 L ed 666; Robinson v. Templar Lodge, I.O.O.F. 117 Cal 370, 49 P 170; Otto v. Journeyman Tailors' Protective & Benev. Union, 75 Cal 308, 17 P 217; Connelly v. Masonic Mut. Ben. Assoc. 58 Conn 552, 20 A 671; Green v. Board of Trade, 174 Ill 585, 51 NE 599; Reno Lodge I.O.O.F. v. Grand Lodge, I.O.O.F. 54 Kan 73, 37 P 1003; Irwin v. Lorio, 169 La 1090, 126 So 669; Eberts v. Congressional Country Club, Inc. 197 Md 461, 79 A2d 518; Hembeau v. Great Camp, K.M. 101 Mich 161, NW 417; Allen v.

Duffie, 43 Mich 1, 4 BW 427; Dewar v. Minneapolis Lodge, 155 Minn 98, 192 NW 358, 32 ALR 1012; Baltimore & O.R. Co. v. Stankard, 56 Ohio St 224, 46 NE 577; Com. ex rel. Burt v. Union League, 135 Pa 301, 19 A 1030; Society for Visitation of Sick v. Commonwealth, 52 Pa 125; Pepin v. Societe St. Jean Baptiste, 24 RI 550, 54 A 47.

The Petitioner's expulsion from a private club is not a matter for Federal jurisdiction and a complaint based thereon cannot state a claim upon which relief can be granted in the absence of a violation of a Constitutional right or of Federal Law.

The Petition makes no claim that Petitioner did not receive notice of charges and hearing or that a hearing for him to present facts in connection with his expulsion was not held or that the Club's action of expulsion was not based on an adopted by-law which was followed by the Board of Respondent Club (See Appendix A attached to this Brief for allegations of the original complaint).

Thus Petitioner attempts to present in his complaint the denial of his right to free speech and overlooks the rights of all other club members to have their club remain in existence.

The reason advanced in the Petition for the invalidity of the expulsion is that his right to "speak freely to advocate changes of policy" (Page 12 of the Petition) was denied and that his "right to talk about a change" was denied (Page 10 of the Petition).

PETITIONER'S ARGUMENTS AS TO JURISDICTION

(Questions 1 through 5)

The Petitioner urges the granting of the Writ by alleging in questions 1 and 2 that the Petitioner's Civil Rights were violated. In light of the Petitioner's action in quo warranto in the Supreme Court of Ohio, seeking the dissolution of the Club of which he was then a member, the reason for expulsion becomes clear.

The due process accorded Petitioner as to procedural matters and the natural justice of the Respondent Club's action in response to his attempts to dissolve the Club would seem to negate any violation of the Civil Rights of Petitioner.

Question 3 attempts to equate the actions of officers of a corporation with the color of state law necessary to bring the matter within Title 42, Section 1983 USC and Title 42 Section 2000A-1 USC.

The argument advanced by Petitioner that incorporation of a private club, under Ohio Statutes providing for incorporation,

clothes the action of the officers and directors of the club with the color of law is not supported by any law, statutory or otherwise.

Question 4 attempts to bring the Respondent Club within the purview of Title 42, Section 2000 USC, et seq. But as a private club the Respondent Club is specifically exempted from the provision of this Act in Title 42, Section 2000 a (e) USC.

The argument in question 5 that the exemption from income tax granted a non-profit corporation is the equivalent of the Federal assistance referred to in Title 42, Section 2000 D USC (See Appendix B this Brief), is not supported by any law, statutory or otherwise, that counsel for Respondent Club is aware of.

PETITIONER'S STANDING

(Question Six)

This Court in Association of Data Processing Service Organizations, et al. v. William B. Camp, 38 LW4193, at Page 4194 said that standing concerns "whether the interest sought to be protected by the complaintant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Using that test, Petitioner's standing with regard to his ultimate complaint, that of his expulsion from membership in Respondent Country Club, would seem to fail.

PETITIONER'S SEVENTH QUESTION

We do not argue question seven as presented by the Petitioner. We feel that the District Court and the Court of Appeals have both herein amply supported the theory which we submit is correct, that these cases advanced by Petitioner do not apply to this Petition since Plaintiff has not been discriminated against by reason of his race or his religion.

APPLICATION OF THE PRINCIPLE OF RES JUDICATA

The Petition makes no mention of one important aspect of the case decided by the Trial Court. At Page VIII of Appendix C of the Petition the District Court found that the dismissal of the 1968 case precluded the Plaintiff's bringing of this suit under the doctrine of Res Judicata and it would seem that this issue alone would be dispositive of this case.

CONCLUSION

We submit that the Writ should be denied for the reason that Petitioner's expulsion from Respondent private club does not constitute in the first instance a claim upon which relief can be granted and upon the further ground that the application of the principle of res judicata precluded the bringing of this cause.

There being no important questions of Federal Law to be settled by this Court raised by the Petition in connection with Petitioner's expulsion from Respondent Club, the writ should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF OHIO

WESTERN DIVISION

James E. Macdonald, Jr., for himself, and for all others similarly situated, Lima, Ohio

Plaintiffs

Case No. C69-135

-vs-

The Shawnee Country Club, Inc., et al.

Defendants

Complaint

The following are excerpts from the Complaint filed in Federal District Court.

. . .

4- Defendant, The Shawnee Country Club, Inc., is a corporation not for profit organized on May 25, 1904, and presently existing under the law of the State of Ohio. It is acting under corporate charter 17496 under the official action and authority of the Secretary of the State of Ohio; and as such The Shawnee Country Club, Inc. exercises corporate rights and power under the grants of authority made to it under Ohio Revised Code Chapter 1702, and other provisions of the law of Ohio.

. . .

5- The Shawnee Country Club, Inc., has about 500 members, many of whom are residents of Allen County, Ohio. The corporate power of the Club is exercised by a Board of Trustees, most of whom are named as defendants in this action.

. . .

8- One of the significant and valuable aspects of the plaintiff's membership in The Shawnee Country Club, Inc., is the right of the plaintiff, and his family, in common with all other members of the Club, to use the club house, swimming pool, tennis courts, golf course, putting green, pro shop, bar, bath house, restaurant, snack bar, locker room, parking lots, and various other facilities and equipment owned by the Club and made available to the members as an incident to their membership.

. . .

9- Previous to January 4, 1965, plaintiff's wife and children had made frequent use of their privileges as members of The Shawnee Country Club, Inc., but since the expulsion of the plaintiff, they have been deprived of the right to such use, to the further irreparable injury to the plaintiff in his property rights.

. . .

19- At all times during the calendar years 1964 and 1965 there was in effect as a rule or by-law of The Shawnee Country Club, Inc., the following Rule, Section 18, the only rule or standard dealing with the corporate power to suspend and expel a member:

> "Section 18. The Board of Govenors shall have the power to suspend from the privileges of the Club or to expel any member whose acts or conduct shall be found by a vote of the majority of the Board, to have been unbecoming to a lady or gentleman or to have been non-compatible with the welfare, character or interest of the Club but no member shall be suspended or expelled without at least ten days notice of the charges made against him or her, nor until he or she shall have had an opportunity to be heard."

. . .

21- On December 16, 1964, the individual defendants, acting through one William J. Wieging, caused to be served on the plaintiff a written notice which stated as follows:

"The Shawnee Country Club
Incorporated - 1904

"P. O. Box 1264 Lima, Ohio

December 16, 1964

"Mr. James E. Macdonald, Jr.
1821 Shawnee Road
Lima, Ohio

"Dear Mr. Macdonald:

"By direction of the Board of Governors of the Shawnee Country Club, Inc., I have beer instructed to notify you that a motion was made to expel you from membership in the Shawnee Country Club, Inc., pursuant to Section 18 of the By-Laws of said Club for the reason that your recent actions and conduct have been non-compatible with the welfare, character and interest of the Club. Said motion passed by a majority vote of the Board and the Board has set the 4th day of January, 1965, at 7:30 p.m. at the

. . .

Shawnee Country Club, Lima, Ohio, as the time and place for you to present any matter you may wish to in connection with your expulsion from said Club.

"THE SHAWNEE COUNTRY CLUB

"BY ORDERS OF THE BOARD OF GOVERNORS

/s/ William J. Wieging
William J. Wieging
Assistant Secretary

"WJW/bb."

. . .

23- From and after January 4, 1965, the defendants removed the plaintiff's name from the roll of the membership in The Shawnee Country Club, and have withdrawn from plaintiff, his wife and children, all rights and privileges of membership, the use of the physical facilities and the freedom to assemble and to associate at the Club house and grounds.

APPENDIX B

TITLE 42 SECTION 2000d-1

2000d. PROHIBITION AGAINST EXCLUSION FROM PARTICIPATION IN, DENIAL OF BENEFITS OF, AND DISCRIMINATION UNDER FEDERALLY ASSISTED PROGRAMS ON GROUND OF RACE, COLOR, OR NATIONAL ORIGIN

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. Pub. L. 88-352, Title VI. Par. 601, July 2, 1964, 78 Stat. 252.